20 June 2014

DG TRADE PUBLIC CONSULTATION ON MODALITIES FOR INVESTMENT PROTECTION AND ISDS IN TTIP

ESF RESPONSE

Question 1: Scope of the substantive investment protection provisions

ESF Response:

ESF is supportive of clearer definitions in the text of the investment protection chapters but would recommend that exceptions to the rules should be kept to a minimum, since they often can be a source of diverging interpretation triggering more disputes and uncertainty.

Definition of "investment": commercial contracts for the sale of goods and services
ESF does not support the blanket and seemingly arbitrary exclusion from the definition of "investment" of "*claims to money that arise solely from commercial contracts for the sale of goods or services...*". The Commission has not explained the reason for this carve-out which could exclude from the protections of the treaty, for example, financial services and products which would have the characteristics of an investment. For example, an ICSID tribunal[1] has found that a hedging agreement with a 12-month term fulfilled the criteria for an investment, namely contribution, risk and duration.

Claims arising under other types of contracts for the sale of goods and services which nonetheless constitute investments may similarly be excluded from the intended scope of the treaty. We refer to the tribunal's statement in the *Deutsche Bank AG v Sri Lanka* case: "*As the Tribunal pointed out in the Pantechniki case, the same product can be an ordinary sale of goods or an investment depending on the attending facts and circumstances of the case: "[i]t is admittedly hard to accept that the free-on-board sale of a single tractor in country A could be considered an "investment" in country B. But what if there are many tractors and payments are substantially deferred to allow cash-poor buyers time to generate income? Or what if the first tractor is a prototype developed at great expense for the specificities of country B on the evident promise of amortisation? Why should States not be allowed to consider such transactions as investments to be encouraged by the promise of access to ICSID?"*[2]

ESF therefore advocates the deletion of the paragraph starting with the words "*For greater certainty...*" in order to allow for a more accurate and fairer fact-based assessment by a tribunal as to whether a particular contract for the sale of goods and services has the characteristics of an investment as set out in the definition starting with "*Every kind of asset...*" including items (a) to (i). In addition, please note that this paragraph in its current form may be difficult to reconcile with the main definition of "investment" including, in particular, sub-paragraph (i) which provides that: "*Forms that an investment may take include....(i) claims to money or claims to performance under a contract*".

Definition of "investment": management contracts
ESF would like to understand why interests arising from management contracts have been excluded from the definition of investment. This is an important form of services related to

[1] *Deutsche Bank AG v Sri Lanka* (ICSID Case No ARB/09/02), Award, 31 October 2012, paras 296ff
[2] *Deutsche Bank AG v Sri Lanka* (ICSID Case No ARB/09/02), Award, 31 October 2012, para 309

public procurement contracts in particular, and it is difficult to see why "turnkey, construction, production, or revenue-sharing" contracts, and "their similar contracts" have been transposed from the BIT example on the left hand side of Table 1 and included in the definition of investment but management contracts have been left out. ESF would strongly advocate for the express inclusion of management contracts in the definition of investment.

Returns
ESF strongly supports the clear statement that "Returns that are invested shall be treated as investments. Any alteration of the form in which assets are invested or reinvested does not affect their qualification as investment".

Question 2: Non-discriminatory treatment for investors

ESF Response:

The introduction of trade law concepts through the GATT/GATS exceptions
ESF emphasizes that one of the main objectives of a BIT, as well as international trade law, is to prevent discrimination against investors on grounds of nationality. Hence, the provisions for national and most-favoured nation (MFN) treatment are fundamental. ESF considers therefore that host State authorities (at whatever level) should not be allowed to discriminate between a domestic and a foreign investor once the latter is already established in a Party's territory.

As for the definitions (see ESF Response in Q1), we consider that exceptions to the rules should be kept to a minimum and would therefore encourage the Commission to offer clearer explanations of what any exceptions would be. However, the Commission is now stating that "in certain rare cases" and "in some very specific sectors", discrimination against already established investors may need to be envisaged. This appears to be transcribed from the introduction of the General Exceptions article of GATT XX and GATS XIV into the agreement. Whatever the rationale behind this, investors' trust, as already stated, is a key factor in any investment decision. We fear that the introduction of such general exceptions in the Investment Chapter will raise doubts as to the value of these basic protections.

In addition, it is unclear how these trade law concepts at article XX of the GATT and Article XIV of the GATS would work in investment law and how this would be interpreted by tribunals. ESF also questions the utility and meaning of the exceptions since they must not be *"applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail..."*[3]. This is circular to a large extent and ambiguous. Also, the application of the exception clauses requires that they should not be in relation to measures that are a *"disguised restriction[s] on international trade"* or *"trade in services"*. Does this imply than an investor can bring all trade law issues into the investment dispute? ESF urges the Commission to carefully consider the implications of this Article Y and provide guidance as to their meaning and interpretation in the investment protection context.

Different non-discrimination protections for financial services
Although the Commission has not provided the proposed text in this consultation, there appear to be different protections proposed for financial services (see the references at Question 10, para 1(a) to "X.3 (Financial Services – National Treatment) and X.4 (Financial Services – Most Favoured Nation). ESF believes that all investors should benefit from the same standard of

[3] Wording from Introductory paragraph of Art XX GATT and Art XIV GATS

protection against non-discrimination, including financial services firms. No justification has been provided for departing from the uniform standards enshrined by individual Member States in existing BITs.

Meaning of Article X.2 para 3

ESF can subscribe to the restriction of "importation of standards", as the spirit of the MFN provisions is not to allow investors to abuse the system by taking advantage of procedural or substantive provisions contained in other agreements concluded by the host country.

However, the meaning and wording of section Article X.2 para 3 is unclear. We ask the Commission to please clarify this provision.

Question 3: Fair and equitable treatment

ESF Response:

ESF agrees with the statement that the obligation to grant foreign investors "fair and equitable treatment" (FET) is an important substantive investment protection standard. The aim is to protect the investments against measures by the host country that would be arbitrary, unfair, abusive, etc. in the absence of any other protection afforded by more specific treaty standards such as non-discrimination.

The vast majority of European BITs guarantee "fair and equitable treatment" of investment, and ESF would strongly recommend the adoption of this standard in the TTIP. Other treaties, and in particular those signed by the United States, refer to the concept of "customary international law", but this has been considered by some to provide a lower level of protection and represents a minimum standard for the treatment of property or aliens.

Significant narrowing of the protection to investors

ESF supports the EU's aim of bringing more clarity to the meaning of FET, however in our view, the proposed definition represents a significant narrowing of the protection currently afforded to investors. In particular, the references to "manifest" arbitrariness, "fundamental" breaches of due process and transparency, "targeted" discrimination imply a very high threshold of misconduct, tantamount to bad faith, in order to establish a breach of the right to FET. The consensus in this area is that there is no requirement for an investor to prove bad faith in order to establish a violation by the state with this obligation of FET[4].

In addition, Article XX para 4 has narrowed the protection currently afforded to investors under FET by eliminating, as a standalone right, the respect of legitimate expectations arising from specific representations by a state to an investor to induce a covered investment. The proposed text states that "*When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation...*". ESF would urge the Commission to re-introduce this protection as a separate element of FET at Article XX para 2. This would not deny a state's exercise of sovereign powers because the legitimacy of the investor's reliance on the state's conduct must take into account the Party's reasonable right to regulate domestic matters in the public interest.

[4] *see Técnicas Medioambientales Tecmed SA v Mexico (ICSID Case No ARB (AF)/00/2), Award of 29 May 2003, at para 153 and Biwater Gauff (Tanzania) Ltd v Tanzania, (ICSID Case No ARB/05/22), at para 602.*

Finally, it must be underlined that investment protection should cover not only the visible part of an investment, but also the activities related to that investment, such as the public procurement contracts won by the investor. The Commission states "*the EU will strive, where necessary, to provide protection to foreign investors in situations in which the host state uses its sovereign powers to avoid contractual obligations towards foreign investors or their investments, without however covering ordinary contractual breaches like the non-payment of an invoice*". This is an important protection for investors and ESF would urge the Commission to include express language to this effect in the treaty in line with the Commission's stated aim.

Question 4: Expropriation

ESF Response:

The greatest risk for a foreign investor is to lose its investment, i.e. to be expropriated without any compensation. One of the fundamental protections provided by BITs is indeed the prohibition of expropriation without fair, prompt and effective compensation.

Direct expropriation
ESF agrees that direct expropriations, like for instance nationalisations, rarely lead to disputes because public authorities usually abide by the rules of fair compensation, although recent examples of nationalisation in Argentina or in Venezuela are a reminder of the importance of these basic protections. We therefore welcome paragraphs 1 to 4 of this article.

Indirect expropriation
ESF understands the willingness of the EU to clarify that the simple fact that a state measure has an impact on the economic value of the investment does not automatically justify a claim that an indirect expropriation has occurred. But nor should a claim be excluded. When necessary, such a claim should be examined on a case-by-case basis and ESF therefore supports the approach at para 2 of the Annex on Expropriation which requires the tribunal to conduct a fact-based inquiry.

ESF also recognises the right and responsibility of a state to protect the public welfare. However, the Commission proposes that only public welfare measures which are "manifestly excessive in light of their purpose" could constitute indirect expropriation. ESF has concerns that this would in practice preclude claims to compensation in circumstances where investors have made significant commitments in good faith as a result of representations by the state in relation to its public policy objectives. In this regard, ESF would support a less prescriptive approach which would allow the tribunal to make a determination following the fact-based inquiry with reference to the general criteria at paras 2(a) to (d) of the Annex, including the extent to which the government action interferes with distinct reasonable investment-backed expectations.

To reiterate, we do not seek to question the right of a government to radically change its policy in one domain or another, but that government must take full responsibility of the consequences of that new policy and adequately compensate domestic and foreign investors who took long term investment decisions with good faith economic expectations. For instance, when a state changes its policy in a given sector, this can be done by respecting all the criteria listed at para 3 of the Annex, i.e. for a legitimate public purpose, to protect health or/and the environment; and it is possible that the only way to achieve such a policy would be to decide to close down some types businesses related to that sector, which will probably not be considered to be a measure "manifestly excessive in light of its purpose". Does this mean that all operators

(domestics and foreigners) who invested in that targeted sector can be expropriated without receiving any compensation? We believe that this should not necessarily be the case. Our understanding is that this could correspond to an indirect expropriation, and hence be eligible for compensation.

Furthermore, we must also express our concern that this new interpretative guidance for arbitrators is expressed in very specific terms which, since they form an integral part of the agreement, will be binding on the arbitral tribunal. Question 5 (below) correctly says that "In the end, the decisions of arbitral tribunals are only as good as the provisions that they have to interpret and apply". In ESF's view, a balance needs to be struck, rather than moving from an excessively broad framework to an excessively prescriptive framework in the proposed text, which will significantly limit the arbitral tribunal's margin of manoeuvre

Question 5: Ensuring the right to regulate and investment protection

ESF Response:

As stated earlier, ESF reiterates that it is clear and indisputable – and indeed it should go without saying - that sovereign states will always have the right to regulate and to make changes in their rules in the public interest, for social, environmental, or any other public policy purpose they see fit.

However, because the Commission's statement on the right to regulate constitutes a carve-out from fundamental investor protections, it is important to ensure that the drafting is tight and the language is consistent throughout so that the meaning of the words used and the scope and application of the right to regulate is clear with respect to each of the investment protection standards as well as in the treaty as a whole. For example:

- the Annex on Expropriation at para 3 refers to measures "*designed and applied to protect legitimate public welfare objectives*";

- the preamble at Question 5 refers to "*measures to achieve legitimate public policy objectives on the basis of the level of protection that they deem appropriate*";

- the general exceptions clauses to the non-discrimination provisions at Question 2, Article Y cross-refer to the general exceptions in GATT 1994 and GATS which themselves consist of a distinct list of measures *"necessary"* to achieve the relevant policy objectives.

In this regard, ESF would like to draw the attention of the Commission that the public objective of ensuring level playing field in services sectors through regulation is never mentioned, although it is a primary objective of the regulation, i.e. to ensure competition so as all services providers can operate in fair and non-discriminatory manner.

ESF accepts that it is well-established policy that foreign investors have to abide by the terms and conditions defined by the host country. Horizontal exceptions are normal, as long as they are on a non-discriminatory basis. We also accept that decisions on competition matters cannot be subject to investor-to-state dispute settlement (ISDS), and that a host country can take measures providing for general exceptions that many apply, for prudential reasons, in situations of crisis.

As we understand, an arbitral tribunal cannot repeal a measure taken by a government, but can only order compensation for the investor when appropriate. In this regard, it is interesting to note that, on the contrary, when a case is brought before a domestic court, the court might also, in certain cases, invalidate or nullify the measure taken by the relevant public authority which amounts to, for example, expropriation.

Question 6: Transparency in ISDS

ESF Response:

The Commission is proposing the inclusion of transparency provisions in all ISDS to reflect the public's interest in the resolution of investment treaty disputes. This would incorporate and expand on developments at UNICTRAL which has recently adopted transparency rules.

ESF believes there is already a degree of transparency in current ICSID arbitrations. In recent years, certain hearings have been held in public and third parties can submit amicus briefs to the tribunal. ESF believes it is also important take into account the parties' right to protect confidential information and maintain the integrity of the arbitral process.

It should be noted that the UNCITRAL Transparency Rules, which are incorporated by reference and expanded by the proposed text, are much broader than the access given to the records in many national court systems. For example, the English courts only allow automatic access to the statements of case filed by parties but not the exhibits. Other documents, such as witness statements, expert reports, skeleton arguments, can only be obtained if the court gives permission.

ESF believes there has been insufficient debate on the impact of such level of transparency in arbitration proceedings. The application of the UNCITRAL Transparency Rules will likely increase time and costs, and create a significant logistical and legal burden on the parties and the tribunal. The losing party (i.e. which could be the investor or the state) will bear the bulk of such costs in accordance with the proposed costs apportionment rule. The open nature of proceedings also risks the leak of protected information (ex to competitors) and politicisation of the process (ex through media intrusion). There is also no guarantee that the most potentially interested persons or organisations will have the means to participate in this process. Tthe redaction of confidential information from documents and partial open hearings create opportunities for distortion and misunderstanding of the record and the issues both within the arbitration process (in any *amicus* submissions) and in the wider public debate. Moreover, it is also in the interest of justice that the parties feel able fully to present their case to the tribunal through the disclosure of internal documents and the provision of expert and witness evidence. Concerns about the protection of confidential information may discourage a full ventilation of the issues, and even may discourage some claims, leading to disinvestment rather than trying to seek for redress.

ESF is of the view that the 2012 US Model BIT strikes a better balance in the types of documents made available to the public in light of the considerations discussed above: pleadings, memorials and briefs are made available but not witness statements or experts' reports or exhibits.

If the Commission is minded to incorporate the UNCITRAL Transparency Rules, then ESF would suggest that they should not be expanded as follows:
- Matters relating to efforts by the parties to settle the dispute prior to the commencement of arbitration should not be subject to the same transparency rules. Such discussions are challenging enough without them taking place in public. For this reason and in circumstances where the Commission would wish to encourage the parties to reach an amicable resolution, ESF would recommend removing the agreement to mediate from the list of documents to be made public.
- Paragraph 3 goes too far in making all exhibits used by the parties automatically part of the public record. This would unnecessarily frontload the time and costs associated with identifying and redacting confidential information from a potentially large number of documents. Given the confidential nature of such documents, it is preferable for a request for disclosure be considered by the tribunal on a case by case basis. This is what the UNCITRAL Transparency Rules provide at article 3(3), and ESF supports that provision.

Question 7: Multiple claims and relationship to domestic courts

ESF Response:

Some BITs require the investor first to "exhaust all domestic remedies". But when that process is ineffective, the availability of neutral arbitration is necessary to provide confidence to investors. It must be recognized that in the EU as well as the US, the federal or sub-federal government, or the local authorities do make mistakes, and the local courts are not always neutral. Partiality may indeed occur and the local court may favour the local government/investor over the foreign investor, for instance when assessing a claim for a breach of investment protection or for expropriation, or by denying due process rights or the right to access avenues for appeal.

Companies investing abroad may find that a specific dispute cannot be solved through the host state's domestic legal system, because in many countries, investment agreements are not directly enforceable in local courts. Some provisions are part of an international treaty, but have not been transposed into national law. Often the protection offered in investment agreements cannot be invoked, in part or in whole, before domestic courts and the applicable legal rules are different. A non-discrimination clause may only be enshrined in a BIT or a FTA, under international law and can only be invoked through an ISDS case. A claim against such clause will not be admissible before a US Court. This means that international arbitration is often the only means to obtain redress when an alleged breach of an investment agreement occurs. This is the reason why an ISDS is compulsory in the Investment Chapter of the TTIP with the US. No ISDS in TTIP is not an option. Otherwise, it can result in a denial of the very protections that the treaty will be designed to guarantee. ESF is of the view that an investor under TTIP should be able to withdraw the case launched in domestic court and pursue the case through ISDS, when there are reasons to believe that the claim is not receiving a fair and equitable treatment and is being discriminated against.

Lapse of time before initiating arbitration: The Commission has not included the text relating to submissions of requests for consultation and determination. Nevertheless, the proposed aggregate 9 month cooling-off period to be imposed on an investor before allowing for the initiation of arbitration is, in our view, too long. Given time and costs involved, recourse by investors to arbitration is often a last resort rather than a tactical step, after attempts at

settlement to national courts have been unsuccessful. In the meantime, the investment's value may become irrecoverable. ESF propose shorter timeframes to allow the parties a window for negotiation without undermining the effectiveness of the remedy.

Other related proceedings: ESF agrees with the approach in not requiring exhaustion of local remedies before initiating proceedings. This is consistent with the purpose of investment treaties.

It is desirable to avoid parallel proceedings which may lead to contradictory decisions. However, paras 1(f) and (g) would preclude an investor from making claims in different *fora* which may have the same factual basis but give rise to different causes of action, possibly against different parties. An investor may wait for years to receive a final judgment/award/decision before being able to initiate treaty arbitration – and even then will be subject to 9 month waiting period - assuming the time limit for initiating a claim has not run out. Alternatively, an investor may be forced to abandon an investment treaty arbitration within 12 months of the constitution of the tribunal (which might be prior to a final award) in order not avail itself of a contractual remedy (to avoid being time-barred).

The proposed measures will be prolonging the ISDS process, including in cases where recourse to domestic courts is not available. We recommend that the Commission assess the practical implications of such requirements more thoroughly before moving ahead.

Question 8: Arbitrator ethics, conduct and qualifications

ESF Response:

ESF does not disagree with the proposal for a roster of arbitrators from which a chairperson or sole arbitrator may be appointed by the Secretary-General of ICSID in the absence of party agreement. However, although full details of the text have not been provided, there do not appear to be safeguards to ensure the independence of the dispute resolution process. For example, the Committee on Services and Investment, charged with establishing and maintaining the list of arbitrators (Article x-42), will also be responsible for recommending binding interpretations of the treaty (Article x-27), will have the power to make a binding determination on the validity of the prudential carve-out (Question 10) and generally provide a forum for consultation between the parties on issues concerning ISDS (Question 12). The roster would give a state party the opportunity to select its party-appointed arbitrator and also have a chairperson (with a decisive voice) whom it has vetted and approved. In this sense, the process could accord one of the disputing parties (i.e. the responding state) an advantage over the investor party. ESF would urge the Commission to consider carefully to role of this Committee and establish a structure to ensure the diversity and independence of the arbitrators appointed from the roster to hear these disputes. The roster should also contain a sufficient number of arbitrators to ensure such independence. The pool of possible arbitrators should not be limited and pre-established; indeed, some special expertise and experience may be required to deal with a large variety of cases, that might not be found is a closed group.

It is important therefore to keep the possibility for one of the parties to challenge the arbitrators - as proposed in Article X-25 paras 7 to 10 - and to keep the possibility for the Secretary-General of ICSID, after hearing the disputing parties and after providing the arbitrator an opportunity to submit any observations, to issue a final decision within 45 days, which is a reasonable time. It will be necessary however to monitor the efficiency of such a measure as to assess whether this will address the issue that the chair is appointed from a list compiled by a state Committee.

The text of future treaties would also contain unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest. This proposal at para 6 seems largely to follow existing arbitration practice and is welcomed by ESF.

Question 9: Reducing the risk of frivolous and unfounded cases

ESF Response:

Frivolous claims

ESF favours a strong and efficient ISDS system and would wish to ensure that all parties have confidence in well-tried dispute settlement. We therefore support the proposal to dismiss frivolous claims early in the proceedings at Articles X-29 and X-30.

Costs

ESF understands the policy choice behind the "loser pays" principle: to discourage investors from bringing unmeritorious claims. For this reason, ESF would agree with the proposal of the Commission at Article X-36 in so far as it would apply only to frivolous claims dismissed by the tribunal at the outset pursuant to the provisions described above.

However, ESF would like to question a blanket application of the 'loser pays' principle, including in well-founded cases, as it might limit arbitrators' judgment and discretion in the award of fees. ESF would like, in particular, to highlight the unintended impact that a strict loser pays costs rule may have on smaller enterprises, which are key drivers for growth. SMEs, to the extent they can access foreign markets, may have less leverage in host states than large corporations and therefore might benefit the most from the investment protections in the treaty. Given the high costs associated with bringing a treaty claim[5], ESF would ask the Commission to assess the possible unintended consequences of the loser pays costs rule as currently drafted. ESF would suggest mitigating this impact by allowing the tribunal to apportion the costs of the arbitration in the same way as the legal fees, i.e. in principle the unsuccessful party pays unless the tribunal determines that such apportionment is unreasonable in the circumstances of the case (rather than only in "exceptional circumstances" as currently drafted).

Question 10: Allowing claims to proceed (filter)

ESF Response:

ESF considers that where filter mechanisms, carve-outs or any kind of exceptions are introduced in an Investment Chapter and in ISDS in particular for certain sectors or types of

[5] *The cost of international arbitration can be significant and an overwhelming burden for small and medium companies: They include i) the administrative charges of any arbitral institution which is involved, ii) the fees and expenses of the arbitral tribunal, iii) the fees and expenses of lawyers, experts, other professionals whose services may be required (e.g., transcribers and interpreters), iv) the cost of hire of the hearing room and facilities, witness expenses, v) any internal costs in terms of in-house counsels, other staff, etc…*

activity, they must be properly justified and limited to the maximum extent possible, because they introduce a risk of politicization of a case and risk making the protections less effective. Indeed the "Committee of experts" will typically be composed of officials from the two signatory countries. Rather than providing an avenue for direct recourse by the investor, the outcome might be decided without an opportunity for the investor's case to be heard.

Financial services filter:
While the text in respect of financial services is incomplete and cross-refers to provisions that have not been included in the consultation, it appears that the Commission is proposing to:
- modify the substantive investment protections that states will guarantee to financial services firms (§1(a));
- carve out from the standard ISDS process all disputes involving financial services (§1(a)) such that these investors would be subject to a different, yet undefined process, and would apparently lose the right to participate in the constitution of the arbitration tribunal (§2);
- carve out from the standard ISDS all disputes in which a state invokes the prudential carve-out (§1(b)) such that the investor would lose the right to participate in the constitution of the arbitration tribunal (§2) and the determination of the validity of the prudential carve-out can be taken out of the arbitration process altogether and submitted to a state committee (§3).

ESF strongly believes that all investors should benefit from the same standard of protection against non-discrimination, including financial services firms. No justification has been provided for departing from the uniform standards enshrined by individual EU Member States in existing BITs. Any such dilution of the protections would go beyond a "filter" mechanism to be applied to measures taken in a financial crisis.

In addition, the proposal to allow a state to refer a measure which is ostensibly prudential for binding determination to a state committee is contrary to the very purpose of ISDS. The effect of this filter would be to politicise such disputes by referring them to a state body for decision. This is not necessary. Any emergency measures for the protection of the financial system will have already been taken by the state by the time an ISDS is initiated, and the tribunal would not have the power to abrogate such measures in any event. Moreover, the Commission has not set out any due process or transparency guarantees which would allow the investor to make submissions to the Financial Services Committee in response to the state's case and receive a fully reasoned decision. No justification for this important omission has been provided.

ESF opposes the Commission's proposal to subject financial services investors to a different ISDS process and prevent them from participating in the constitution of the arbitration tribunal in the same way as other investors. Whilst there is reference to a process for "Financial Services – Dispute Settlement" no proposed text has been provided for comment by stakeholders. No reason has been stated for not allowing financial services investors to select their party-appointed arbitrator and participate in the appointment of the chairperson in the usual way, especially in circumstances where a filter in respect of prudential measures would be in place.

Therefore, ESF disagrees with the carve-out proposed for financial services. While the need for prudential measures is undisputed, robust safeguards must be in place to prevent abuse of the prudential carve-out as a means to avoid a state's commitments to the protections guaranteed by the treaty. ESF would welcome the opportunity to comment on the full text as part of the consultation process prior to the conclusion of the negotiations.

Question 11: Guidance by the Parties (the EU and the US) on the interpretation of the agreement

ESF Response:

ESF is rather concerned by these provisions, which re-introduce the possibility of politicising proceedings. The very reason why ISDS mechanisms were originally created was to avoid politics entering into the disputes and keep them truly neutral. ESF believes that the allowance for state parties (at Article X-27) to provide binding interpretations on the scope of investor protections outside the treaty negotiation process is really problematic. This could undermine confidence in investor protection by politicising the process, changing the normative framework in which investors operate retroactively, possibly even after a dispute has arisen, undermining the purpose of ISDS in submitting the dispute to a neutral decision-making body, and creating uncertainty for foreign investors when assessing the risks/rewards of a claim prior to pursuing a treaty claim. This lack of predictability in the protections provided to investors is compounded by the proposed provisions in Question 7 (Article X-21) which require an investor to postpone, and possibly entirely waive, alternative recourse to domestic court or commercial arbitration, in order to benefit from investor protection guarantees and avail themselves of ISDS. ESF would urge the Commission to assess the value-added of such provisions.

Questions surrounding the scope and interpretation of the investor protection standards in the treaty should be addressed more properly in the drafting of the provisions, including the binding Annexes, which are the subject of this consultation. In addition, the transparency provisions at Question 6 (Article x-33) and the proposed express right accorded to the non-disputing state party to make submissions to the tribunal once a dispute has arisen (Article X-35) provide an opportunity for states to make submissions on the proper interpretation of the treaty and any relevant public policy considerations whilst preserving the integrity of the investment protection system.

The ability for a tribunal to judge in full equity, in full fairness and without external interference is a fundamental principle of any adjudication system. We fear that the Commission's proposal might go too far in diminishing the investor's rights.

Question 12: Appellate Mechanism and consistency of rulings

ESF Response:

ESF welcomes the proposal to establish an appellate mechanism in TTIP so as to allow for review of ISDS rulings. This will promote fairness, consistency in the interpretation of investor protection system, reduce uncertainty and improve compliance. We believe that a mechanism similar to the appellate body of the World Trade Organisation, adapted to take into account that one of the parties to the dispute is a private investor would be a good starting point. In this context, the Commission should consider the establishment of an independent secretariat for the Appellate Body to enhance the independence of decisions.

ESF calls on the European Commission to consult interested stakeholders so that they might have the opportunity to put forward their views prior to its adoption. Such appellate mechanism must strike a balance between reviewing awards on points of law and achieving finality for the parties to the proceedings through well-defined avenues for appeal within strict time limits.

In relation to the possible draft provisions relating to the Award at Article xx, ESF believes that the proposal for an award to be remitted back to the tribunal to reflect the findings of the Appellate Body is unsatisfactory and undermines the jurisdiction and decision-making powers of the tribunal. In ESF's view, a better approach would be for the Appellate Body either to modify or overturn the award, or to remit it to the tribunal for a further decision.

C. General assessment

Question 13

What is your overall assessment of the proposed approach on substantive standards of protection and ISDS as a basis for investment negotiations between the EU and US?

ESF Response:

There are currently 1400 BITs of EU Member States, which are offering strong investment protection. It has taken a long time, helped by national negotiators' expertise plus well-established jurisprudence from arbitration cases, to achieve this degree of protection. There is no doubt that the very large volume of FDI invested by European firms around the world reflects the high level of protection now in place. Investment decisions require trust among private partners as well as between the private investor and the country where it decides to invest, and good BIT protection contributes to this trust. Investment protection is also a means for countries around the world to attract and retain FDI for the benefit of their economies. These agreements promote foreign investment, trade, value-added jobs and income.

They enshrine a basic set of generally accepted investor protections with the following characteristics: broad-based definitions for investors and investment, unqualified Most Favourite Nation and National Treatment clauses, unqualified Fair and Equitable Treatment clause; a broad "umbrella clause; no exceptions for particular sectors; no filter mechanisms; full compensation for direct & indirect expropriation. All existing BITs signed by the EU Member States also include an ISDS process which allows investors to initiate arbitration proceedings against the host state before an impartial and neutral arbitral tribunal with free choice of arbitrators by the parties to the dispute.

It should also emphasised that the initiation of a dispute between an investor and a state is triggered by a measure by the host state, for example if the host state takes a measure leading to direct or indirect expropriation (as defined in the BIT) which would hamper or nullify the reason for the original investment in that country. So the primary victim is the company, not the state, as too often heard.

Investment agreements fulfil two fundamental purposes: a guaranteed level of substantive protection under international law which is not subject to the national law of the host state and a neutral forum for dispute resolution outside the national law system. It should be noted that the protections provided under a BIT (e.g. non-discrimination) are different to the contractual rights which may be enforced in national courts or commercial arbitration. This means that ISDS is usually the only means of seeking redress for breach of treaty rights. It is clear that European investors rely on and frequently use these treaties.

Businesses do not like conflicts with the authorities of the host countries in which they invest. Disputes can be lengthy and costly. A decision by an investor to make a claim against a host state is usually not taken lightly or speculatively. Whilst no system can be completely shielded

from abuse, most private enterprises which have made a long-term commitment of financial and human resources in a foreign state will assert a treaty claim as a last resort, when the problem cannot be solved through negotiation or within the domestic legal system of the host state. Most enterprises will initiate arbitration because they believe they have a legitimate claim and further to legal advice that the state's conduct breaches the protections guaranteed under international law. Many months can pass before getting an ISDS process activated, and often many months will go by before a decision of the arbitration tribunal is given. In the meantime, the investor loses business. Such proceedings are not without risk for investors: apart from the time and substantial costs involved, they require the investor to take adversarial steps against the state in which they do business.

ESF believes that the Commission should use its negotiating mandate under the Lisbon Treaty to improve and strengthen, and not dilute, the generally accepted, fundamental protections that are currently enshrined and relied upon in the existing 1400 BITs.

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10 July 2014

LIST OF ESF MEMBERS SUPPORTING ESF REPLIES TO DG TRADE CONSULTATION ON INVESTMENT PROTECTION

1. Architects' Council of Europe –ACE
2. British Telecom Plc
3. BDO
4. Bundesverband der Freien Berufe - BFB
5. Bureau International des Producteurs et Intermédiaires d'Assurances – BIPAR
6. BUSINESSEUROPE
7. BUSINESSEUROPE WTO Working Group
8. Conseil des Notariats de l'Union Européenne – CNUE
9. Deutsche Bank AG
10. Deutsche Telekom AG
11. Deutsche Post DHL
12. DI – Confederation of Danish Industries
13. Ecommerce Europe
14. EK - Confederation of Finnish Industries
15. Ernst & Young
16. EuroCommerce
17. EuroCiett
18. European Association of Cooperative Banks – EACB
19. European Broadcasting Union - EBU
20. European Community Shipowners' Associations – ECSA
21. European Express Association – EEA
22. European Federation of Engineering and Consultancy Associations –
23. EFCA European Public Telecom Network – ETNO
24. European Savings Banks Group – ESBG
25. European Satellite Operators Association - ESOA
26. Fédération des Experts Comptables Européens – FEE
27. Fédération de l'Industrie Européenne de la Construction – FIEC
28. Foreign Trade Association - FTA
29. IBM Europe, Middle East & Africa
30. Inmarsat
31. Irish Business and Employers' Confederation - IBEC
32. KPMG
33. Law Society of England & Wales
34. Microsoft Corporation Europe
35. Oracle Europe, Middle East & Africa
36. PostEurop
37. Prudential Plc.
38. Siemens AG.
39. Standard Chartered Bank
40. Svenskt Näringsliv (Confederation of Swedish Enterprise)
41. Tata Consulting Services - TCS
42. Telefónica SA
43. Telenor Group
44. The CityUK
45. Thomson-Reuters
46. Zurich Financial Services

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